Supreme Court, U.S.
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NO. 89-1320

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF FLORIDA,

Petitioner,

v.

CHARLES LEWIS BURR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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May 7, 1990

QUESTION PRESENTED

ON REMAND FROM THIS COURT IN BURR V. FLORIDA, _____ U.S. _____, 108 S.Ct. 2840, 101 L.Ed. 2d 878 (1988), DID THE FLORIDA SUPREME COURT ERRONEOUSLY APPLY JOHNSON V. MISSISSIPPI,. _____ U.S. _____, 108 S.Ct. 1981, 100 L.Ed. 2d 525 (1988), IN VACATING THE DEATH SENTENCE AND ORDERING A NEW SENTENCING PROCEEDING.

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OTHER AUTHORITIES

Rule 10, Rules of the Supreme Court

Rule 404(b), Federal Rules of Evidence

Eighth Amendment, U.S. Constitution

STATEMENT OF THE CASE

The Respondent accepts the Petitioner's statement of the case with one exception. The Florida Supreme Court, on remand from this Court, did not send the case back "to the trial court to reconsider the aggravating circumstances versus the mitigating circumstances without the influence of similar fact evidence." (Petitioner's Petition for Writ of Certiorari - Page 5).

In fact, the Florida Supreme Court decided only that the sentencing court could not consider the conduct for which Mr. Burr has been acquitted. That court did not eliminate from consideration other collaterally admitted evidence and left for the sentencing court, in the first instance, to determine the weight collateral evidence "should be given in proving the aggravating circumstances applicable in a particular offense." Burr v. State, 550 So. 2d 444, note 1 (Fla. 1989).

STATEMENT OF THE FACTS

A.

THE STATE'S CASE

By August 20, 1981, Domita Williams and Charlie Burr had been going together for two or three weeks and were talking of marriage (T-832, 856). About 6:30 that morning Burr drove his car to Williams' house so he could take Williams to work (T-832). Burr went inside and 15 or 20 minutes later, or shortly before 7:00 a.m. (T-833-834), the couple left the house and headed west on Highway 27 towards Tallahassee (T-833). About 7:00 a.m. or a little later (T-834) Burr pulled into the parking lot of a "Suwannee Swiftee" convenience store and waited while Williams went inside (T-834). About five to ten minutes later (T-850) she came out of the store with a cheesburger and candy bar (T-834). Burr then got out of the car and went inside (T-835). Williams began eating her sandwich and only looked up when she heard a shot (T-836-837). Burr, smiling got into the car and, seeing that Williams was crying, he asked her what was wrong (T-837). Williams saw the imprint of a gun in his pants (R-838).

Kim Miller, a customer, stopped at the Suwannee Swiftee about 7:00 a.m. and found the body of Steve Hardy, the clerk, lying over an open safe (T-866, 871). Hardy had been shot behind the ear with a .22 caliber bullet (T-913); death was instantaneous (T-968). At 7:09 a.m. a dispatcher from the police department received Miller's telephone call reporting the incident (T-868). The police responded and within minutes they had cordoned off the area (T-874). They found, however, no fingerprints or hairs to tie Burr to the murder (T-886). $252.75 has been taken from the store (T-877).

About 8:00 a.m. (T-853) Williams arrived at the Worthington Park Apartments where Burr lived with a Katrina Jackson and her husband (T-918). Tammy Footman, a cousin of

Williams, was also there. Williams entered the apartment alone (T-840). She acted nervous (T-1345) and asked if they had heard about the Suwannee Swiftee robbery (T-1357). Williams said that she had bought a cheesburger there while Burr was inside, and on the way out she had heard a shot. She then got into the car and left (T-1357, 957). Whether she left by herself or with Burr is uncertain (T-1358). Burr came into the apartment a few minutes later (T-1346), and like Williams, he also acted differently (T-1358-1359). He began packing his bags and a short time later Williams and Burr left (T-1360).

At work sometime later, Williams asked her supervisor, Katherine Haygood, if she had heard about the robbery (T-1135). Although Williams could not recall what she had told Haygood (T-841), Haygood said Williams (who was calm) (T-1139) told her she had bought a soda indside the store about 8:00 or 8:30 that morning (T-1138), and while inside she had seen a white boy in bluejeans walking up and down the aisles. Williams then left the store but drove by a short while later and saw several police cars outside the store (T-1137). Although Haygood encouraged Williams to call the police (T-1138), Williams never did (T-842).

Burr picked up Williams after work, and the pair drove to Melbourne for the weekend (T-843). Burr took with him a box of .22 caliber guns which he sold in Melbourne (T-844). Despite what had happened, and although Williams claimed she was afraid of Burr (T-856), she did not look

like she was afraid of him (T-960), they continued to act like a couple in love (T-960), and they were still talking of marriage (T-856). (Burr had never threatened Williams (T-863)).

Emil Ferrell worked at a "Majik Market" in Palm Bay which is in the vicinity of Melbourne. On Saturday evening, August 22nd, he got a phone call at home from someone asking him who was working at the store the next morning (T-978). Ferrell said he was. The next morning, Sunday, he got another phone call asking who was working (T-978). Again, Ferrell said he was.

About 8:00 a.m. Burr came into Ferrell's store and stood by the microwave oven until the store was empty. He approached Ferrell and asked him if his name was Ferrell. He said yes, and Burr asked him if he had ever seen him. Ferrell said no. Burr then pulled out a gun and said "I'm going to kill you. Open the register." (T-1052). Burr told him two more times to open the register. Without getting any money (T-1053), Burr shot Ferrell twice (T-1052).

With Burr still in the store, Ferrell ran outside and asked a customer, who had just driven up, for help (T-1055). The man fled and Burr came out of the store, jumped into a rather small, old blue or green car, and left (T-1058).

About midnight on August 28, 1981, James Griffin

worked in a Majik Market in Port Malibar, also near Melbourne, (T-991). Burr came in, and as Griffin rang up his purchase, Burr pulled out a gun and said, "Give me all your money and don't be no fool." (T-1063). After Griffin had given him the money, Burr stepped back and shot Griffin once in the abdomen. Griffin said he "would get him for this," and turned. Burr shot him in the left elbow and then left in a brown or maroon car (T-665).

Lloyd Lee was working in a 7-11 convenience store in Melbourne about midnight on September 8, 1981 (T-1069). A man Lee later said was Burr came in the store, got some items, and came to the cash register (T-1070). As Lee rang up the items, Burr pulled out a gun and demanded money, (T-1070). After getting the money, he told Lee to "be cool" and then turned to leave. He turned back, however, and shot Lee twice (T-1070).

Mr. Lee, when asked if he had "any question in your mind" as to whether or not Mr. Burr was his assailant, stated

> No question at all, sir. I'm sure he is the one that shot me as I am sitting here talking to you now. (T-1073).

Subsequent to the imposition of the death sentence, a jury found Mr. Burr not guilty of robbing and shooting Mr. Lee. The State of Florida subsequently dismissed the case against Mr. Burr pertaining to Mr. Farrell.

B.

THE DEFENSE'S CASE

A series of customers arrived at the Suwanne Swiftee on August 20, 1981, from shortly before 7:00 a.m. until All saw Steve Hardy alive approximately 7:10 a.m.

Clarence Lowman arrived about 6:50 a.m. and left right after 7:00 a.m. (T-1078). As he was leaving, two other cars drove up (T-1078). Vincent Prichard drove up around 7:00 a.m. As he left the store, he saw a black man wearing glasses walk towards the store, stop, then walk away (T-1082-1083). A tall, young man drove up as Prichard drove off (T-1083). Although Prichard drove away, two minutes later he drove past the store after he had picked up some men (T-1086). As he drove by he saw Kim Miller, a friend of his, pull into the store (T-1086).

John Thompson pulled into the store about six minutes after seven (T-1096) and parked next to a blue Ford (T-1102). When he went inside, he saw Hardy, who was acting unusual, like he had something else on his mind (T-1106). Another man, not resembling Burr, stood at the back of the store by the cooler (T-1109). He acted suspiciously, like he was just passing the time (T-1116).

On August 20th, Domita Williams drove her mother (Minnie Pompey) to work about 6:30 a.m. (T-1156). Pompey worked at a day care center about a 20 minute drive from where she lived, and that morning Pompey "punched in" at

6:56 a.m. (T-1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after seven she started on the 20 minute trip back home. (T-1158).

Shortly after 7:00 a.m. Ruth Grant and her daughter Valerie were heading west toward Florida State University along Highway 27. They passed the Suwannee Swiftee and saw several police cars there (T-1194). A short time later, they saw an ambulance heading towards the Suwannee Swiftee and seconds later saw Domita Williams, a relative of theirs, passing, apparently heading home passed the Suwannee Swiftee (T-1195).

Thursday, August 20, was the first day Domtia Williams had to report to work at the Sunland Training Center in Tallahassee (T-1269). Because she did not have a car of her own, she drove her mother to work so she could use her mother's car (T-1269). As she returned home, she passed by the Suwannee Swoftee store and several police cars there (T-1270). She was at work by 9:00 a.m., and about 5:00 or 6:00 p.m., she saw Burr and he stayed with her that evening (T-1271-1272).

Several weeks later, when Detective Ash of the Leon County Sheriff's Office focused his murder investigation upon Burr, Williams and their group, he questioned Williams. When she talked with Ash, she felt scared because Ash told her that he had enough evidence to lock her up without bail

(T-857). He also told her he could arrest her as an accessory after the fact (T-1388) and for withholding information (T-1166). Scared by Ash's threats (T-1261), and not knowing what to do (T-1293), Williams answered Ash's leading questions implicating Burr (T-1226, 1313).

REASONS FOR DENYING THE WRIT

The Florida Supreme Court, in response to this Court's action Burr v. Florida 108 S.Ct. 2840 (1988), has remanded this case to the sentencing judge to determine anew the appropriate penalty for Mr. Burr's conviction for first-degree murder. From this decision, Burr v. State, 550 So.2d 44 (Fla. 1989), the State of Florida has not requested a stay of the mandate from the Florida Supreme Court or this Court. The case is presently pending in the Circuit Court, in and for Leon County, Florida, amenable for action. Therefore, whatever action this Court is considering may be moot.

I.

THE ISSUE RAISED BY THE STATE'S PETITION IS NOT SUFFICIENTY IMPORTANT TO JUSTIFY THIS COURT'S INTERVENTION

As noted by the State's Petition, the Florida Supreme Court has applied Johnson v. Mississippi, 486 U:S. 578 (1988) only to Mr. Burr's case. There is no allegation that the Florida Supreme Court has construed Johnson on a systematic basis. Compare Hitchock v. Dugger, 481 U.S. 393

(1987) and the Florida response, e.g. Downs v. Dugger, 514 So.2d 1069, 1070 (Fla. 1987).

The State's petition is noteworthy only in that it devotes 23 pages to its "Statement of Facts." This is a telling manifestation that this case is not of national import and will announce no new rule of law. See Florida v. Wells, ____ U.S. ___, ____ S.Ct ____ (1990) (Justice Stevens, concurring in judgment).

The question, as posed and presented, is not certworthy. See Rule 10, Rules of the Supreme Court.

II.

THE DECISION BY THE FLORIDA SUPREME COURT IS CORRECT

Should this Court look to the merits of this issue, it is obvious that the Florida Supreme Court correctly decided the case. The State's petition focuses to a large degree on federal cases interpreting Rule 404(b) of the Federal Rules of Evidence. This comparison is inapposite to a death sentencing proceeding governed by the Eighth Amendment's reliability standard and Florida's methodology for determining admissible evidence.

Unlike federal law, Florida prohibits the admission of any information relating to criminal activity for which a person has been found not guilty. State v. Perkins, 349 So.2d 161 (Fla. 1977). For these purposes, Florida has determined that this evidence is unreliable and cannot be used for any reason.

Under Florida law, the reliability of the capital sentencing procedure was called into federal constitutional question when Burr was acquitted in the Lloyd Lee robbery case. Zant v. Stephens, 462 U.S. 879, 887-80 (1983). "The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." Clemons v. Mississippi, _____U.S._____, 110 S.Ct. 1441, 1448 (1990). The information used to provide a defendant with this individualized treatment must be reliable, Lockett v. Ohio, 438 U.S. 586, 604 (1978) and as such the Eighth Amendment acts as an evidentiary rule that screens out unreliable data (e.g., the character of the victim Booth v. Maryland, 107 S.Ct. 2529 (1987)). See also Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

In addition, the jury that convicted Mr. Burr of the murder recommended a life sentence. As this Court is aware, this recommendation carries special importance in Florida death penalty jurisprudence. Tedder v. State, 322 So.2d 908 (Fla. 1975). The Florida Supreme Court noted the weakness in the proof of the State's case in aggravation. Burr v. State, 550 So.2d 444, 446 (Fla. 1989)("The medical examiner did testify to the manner in which the crime may have been committed, but his testimony is equivocal, at best, and falls short of establishing beyond a reasonable doubt that

the crime was committed in a cold, calculated and premeditated manner or that the motive of the murder was for witness elimination to avoid arrest.")

CONCLUSION

In light of these factors, the Florida Supreme Court's reasonable opinion presents no issue needing review and therefore this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Mr. Burr's Brief in Opposition to the Petition for Writ of Certiorari has been deposited in a United State post office, with first-class postage prepaid, to Ms. Carolyn M. Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050 this 7th day of May, 1990.

STEVEN L. SELIGER